

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the matter of

RICHARD SCARBROUGH and HUDALJ 88-1286-DB
D & S PROPERTIES

Respondents

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Richard Scarbrough, pro se

William Johncox, Esquire
For the Department

Before: WILLIAM C. Cregar
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of a proposal by the Department of Housing and Urban Development ("the Department" or "HUD") dated July 20, 1988, to debar Richard Scarbrough and his affiliate, D & S Properties, from further participation in HUD programs for a period of three (3) years from the date of his prior suspension, August 3, 1987. The Department's actions are based upon Respondent Scarbrough's conviction in the United States District Court for the Western District of Tennessee, Western Division, for violating 18 U.S.C. Secs. 1001 and 2. Respondents had been previously suspended on August 3, 1987, from further participation in HUD programs pending final action after the indictments were returned. They did not appeal the suspension. The Department duly notified Respondents of the proposed debarment, and they requested a hearing on September 7, 1988.¹ Because the proposed action is based on a conviction, the hearing was limited under Departmental Regulation, 24 C.F.R. Sec. 24.13(a)(3) to submission of documentary evidence and written briefs. This matter being ripe for decision, I now make the following findings and conclusions based upon the record submitted:

¹ Respondent Scarbrough claims, and it is uncontroverted in the record, that he did not receive a copy of the proposed debarment until September 7, 1988. This document was requested from the HUD Memphis Office upon his having learned about its existence in a discussion with the Office Manager. He had inquired about his continuance on the list of debarred contractors as a result of a Temporary Denial of Participation imposed some 15 months earlier. He claims that he did not receive a copy of the proposed debarment letter until that date because he changed his address.

Findings and Conclusions

Respondent Scarbrough and his partner, Larry Doyle, owned and operated a real estate investment business in Memphis, Tennessee, doing business as D & S Properties. Respondents were in the business of buying properties and reselling them to buyers with HUD-FHA insured loans.

On December 4, 1987, Respondent was convicted contrary to his plea in the U.S. District Court for the Western District of Tennessee, Western Division, of "... making and causing to be made false, fictitious, and fraudulent statements to the Department of HUD, in violation of Title 18, U.S.C. Secs. 1001 and 2 as charged in Counts 5 and 6 of the indictments." (Govt. Exh. 4). The indictment was dated May 12, 1987.

Following the indictment, Respondent was issued a Temporary Denial of Participation in accordance with 24 C.F.R. Sec. 24.18 on June 12, 1987. As stated above, he was also suspended on August 3, 1987, as a result of the indictment.

Respondent Scarbrough was sentenced to two years probation as to count 5. As to count 6, he was sentenced to pay a fine of \$2,000 during the period of his probation and to perform 100 hours of community service. (Govt. Exh. 4).

The counts of the indictment upon which Respondent Scarbrough was convicted charge he falsely represented to HUD-FHA in settlement statements that borrowers paid earnest money and cash towards the purchase of real estate when, in fact, these statements were false and known by him to be false². The evidence supports the inference and I find that these acts were done for the purpose of obtaining FHA mortgage insurance.

The Department relies upon the causes stated in 24 C.F.R. Sec. 24.6(a)(2) and (c)(3), (12) and (13). These regulations provide for debarment upon conviction of a crime involving false statements and/or falsification and for conduct even without a conviction which indicates a lack of business integrity affecting the present responsibility of the HUD contractor or participant, the making of the HUD contractor or participant, the making of false statements for the purpose of influencing an act of the government, and any other conduct affecting the present responsibility of a contractor or participant. HUD also argues that a three year debarment is necessary to protect the public interest and to deter misconduct by other participants in HUD programs.

The Respondent, noting that he was suspended by operation of the Temporary Denial of Participation of June 12, 1987, requests that date be considered as the beginning of his suspension. He points out that he received a rather light sentence relative to persons convicted of similar offenses and that there was no monetary loss to the government.³

² In his appeal Respondent notes that the government's brief incorrectly asserts that, "Respondent and others were involved in a conspiracy" (Govt. Brief, p. 4) and that he was convicted of "aiding and abetting" (Govt. Brief, p. 9). No evidence in the record supports these assertions. Accordingly, in making my determination I have disregarded these allegations.

³ Respondent also urges a defense made at his trial that he signed the closing sheets in blank; that others filled in the erroneous information and, accordingly, that he lacked the requisite criminal intent. In view of the fact that he was convicted, it is unnecessary to consider this assertion. Even if there were no conviction, evidence of criminal intent is not necessary to satisfy the requirements for debarment as debarment is not penal. See 24 C.F.R. Sec. 24.6 (c), (3), (12), (13); Cooper Plumbing & Heating Co. v.

Respondents do not dispute that they are "participants" as defined in 24 C.F.R. Sec. 24.4(u). This definition includes

" . . . any person who directly or indirectly participates, or who may reasonably be expected to participate in HUD programs." The term includes any recipient of HUD benefit either directly or indirectly. It also includes real estate agents and brokers. Since acquiring properties and reselling to FHA insured buyers, they clearly come within this definition.

Debarment is a sanction which may be invoked by HUD as a measure for protecting the public by ensuring that only those qualified as "responsible" are allowed to participate in HUD programs. 24 C.F.R. Sec. 24.1; Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980); Roemer v. Hoffman, 419 F. Supp. 130, 131 (D.D.C. 1976). "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with HUD. This includes his integrity, honesty, and ability to perform. The primary test for debarment is present responsibility although a finding of present lack of responsibility can be based upon past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Roemer, supra. It is clear that the Respondents evidence a clear lack of present responsibility based upon the conviction for falsification of settlement statements in order to sell property insured by FHA. This indicates a lack of business integrity and honesty and substantially increases the government's risk in dealing with them. Accordingly, Respondent's conviction for falsification is cause for debarment.

I have considered the matters submitted by the Respondent in mitigation. I am persuaded that under the circumstances of this case, the practical offset of the Temporary Denial of Participation was to suspend the Respondents from participation in HUD programs from June 12, 1987, to the date this action was proposed. The imposition of the three-year debarment requested by HUD several months after the imposition of the Temporary Denial of Participation would effectively impose a sanction in excess of the suggested regulatory standard of three years. 24 C.F.R. Sec. 24.10. Because of the length of time during which Respondents have, as a practical matter been suspended, and because of the absence of any aggravating factors, I have concluded that a debarment for a period of three years from the date of the imposition of the Temporary Denial of Participation is appropriate and necessary to insure that the seriousness with which the Department views the Respondents' conduct would not be misconstrued and that the public trust and fisc will not be subjected to risk in the future.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Richard Scarbrough and D& S Properties for a period of three years from June 12, 1987, the date of the issuance of the Temporary Denial of Participation.

William C. Cregar
Administrative Law Judge
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., #2156
Washington, D.C. 20410

Dated: January 11, 1989

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM C. CREGAR, Administrative Law Judge, HUDALJ 88-1286-DB, were sent to the following parties on this 11th day of January, 1989, in the manner indicated:

CERTIFIED MAIL:

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